

General Information Letter: Withholding of Illinois income tax is required when federal income tax is withheld from compensation paid in this State.

April 2, 2007

Dear:

This is in response to your letter dated March 13, 2007 in which you request information regarding Illinois income tax withholding requirements. The nature of your request and the information you have provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department, See 86 Ill. Adm. Code 1200.120(b) and (c), which may be found on the Department's website at www.revenue.state.il.us.

In your letter you have stated the following:

I am employed since 2004 by a company (and payroll office) based in CITY1, STATE. I am an IL resident since 1948 and perform all my services for my company from my home office in CITY2, IL. I travel extensively for my company throughout the USA (13 states). I do not provide any services in STATE other than attend (sic) occasional company meeting.

Since I was hired in February of 2004, my state tax withholding has been taken out of only IL. That is true for 2004, 2005 and thru September 2006. In Sept. 2006, our company informed me (and others out of state) that we were now required to have STATE state tax withholding (per the company's accountant). I completed a W4 for STATE as exempt. This was researched by myself and others and accordingly (sic) to the "2007 STATE Employers Tax Guide" (see below) – I am exempt from STATE state tax and should be withholding only IL. We gave this information to our company back in Sept (sic) 2006.

From STATE Employers Tax Guide (page 10 IP 2007(1), NAME – Employer's Tax Guide)

Example 6 : Working solely outside STATE: A resident of State Y works in State Y for an employer whose main office, including the payroll department, is located in STATE. The employer is not required to withhold STATE income tax even though payment is made from a point in STATE since the employee is a nonresident and performs all his services outside STATE. The employer should contact State Y for withholding requirements in that state.

My company stopped withholding IL state taxes at the end of Sept (sic) 2006 without my permission. I never gave any authorization either in writing or verbally to discontinue this process.

So here is the question (sic) I am trying to get answered.

1) Is it illegal for my company to stop my IL withholding without my permission? (they are still withholding Federal)

2) Is there any statute or law either Federal or State that defines this – if so can you provide?

RESPONSE

Section 701 of the Illinois Income Tax Act ("the IITA"; 35 ILCS 5/101 *et seq.*) sets forth the requirements relating to an employer's withholding of Illinois income tax. Subsections (a) and (b) of that section state as follows:

(a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:

(1) compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual; or

(2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) of Section 201.

(b) Payment to Residents. Any payment (including compensation) to a resident by a payor maintaining an office or transacting business within this State and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601(b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state.

Department of Revenue Regulations section 100.7020 provides regarding the requirement that the employer transact business within this State.

a) General rules. The phrase "employer transacting business within this State" includes any employer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the employer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such employer or subsidiary is licensed to do business in this State.

b) Agents. It does not matter that an agent may engage in business on his own account in other transactions, nor that such agent may act as agent for other persons in other transactions, nor that he is not an employee but is an independent contractor acting as agent. The term "agent" is broader than the term "employee". "Agent" includes anyone acting under the principal's authority in an agency capacity.

Department of Revenue Regulations section 100.7010(a)(1) provides that if withholding is required under the above rules, the entire amount of such compensation is subject to withholding.

Pursuant to IITA section 304(a)(2)(B), compensation is paid in this State if:

- (1) The individual's service is performed entirely within this State;
- (2) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or
- (3) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

In applying IITA section 304(a)(2)(B), Department of Revenue Regulations section 100.7010(a)(3) provides that the rules set forth therein "are to be applied in such manner that, if they were in effect in other states, an item of compensation would constitute 'compensation paid in' only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was performed solely in such other state, it could not also be compensation paid in Illinois. See Publication 130, Who is Required to Withhold Illinois Income Tax, for a more detailed explanation.

Pursuant to the statutory provisions and regulations cited above, Illinois law requires an employer maintaining an office or transacting business in Illinois to withhold Illinois income tax with respect to any item of compensation paid in this State as determined under IITA section 304(a)(2)(B). It is possible that certain compensation may be subject to withholding in Illinois and one or more other states. An item of compensation may constitute "compensation paid in this State" under IITA section 304(a)(2)(B) and therefore be subject to withholding under section 701, and at the same time be subject to withholding in another state according to such other state's laws. The Department cannot provide any guidance on the application of another state's laws.

With regard to your question, the employer's requirement to withhold Illinois income tax generally does not depend on the employee's permission. Similarly, the employer's requirement to withhold Illinois tax generally does not depend on whether another state's law requires withholding. Based on the information you have provided, your employer may well be required to withhold Illinois income tax. If the employer does not make the required withholding, the employer may be subject to interest and penalty. See 35 ILCS 5/706. Note, however, that as a resident you remain liable for Illinois income tax owed with respect to your compensation income whether or not your employer fails to withhold tax. If withholding is not made, you may need to make estimated tax payments. See Form IL-1040-ES and Instructions.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items one through eight of 86 Ill. Adm. Code 1200.110(b).

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Sincerely,

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